



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 22, 1995

Ms. D. Kay Woods
Abernathy, Roeder, Robertson & Joplin
P.O. Box 1210
McKinney, Texas 75069-1210

OR95-826

Dear Ms. Woods:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 34332.

The City of Frisco (the "city") received a request for Emergency Medical Service ("EMS") records of two individuals injured in an accident, one of whom died, and other city records related to that accident. You indicate that some records have been released to the requestor. However, you assert that a memorandum is excepted from disclosure under section 552.103(a), and that the EMS records are confidential pursuant to section 773.091 of the Health and Safety Code (the Emergency Medical Services Act).¹

To show the applicability of section 552.103(a), a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. You state that litigation is reasonably anticipated due to the fact that the city has

¹The requestor asked for EMS records, a fire department report, photographs, and other documents "pertinent to the accident." You contend that the request for "pertinent" documents is too broad to respond to. However, it appears that you have identified at least one responsive document, the memorandum at issue. We note also that a governmental body must make a good faith effort to relate a request to information held by it. Open Records Decision No. 87 (1975). When a request is overbroad, the governmental body should advise the requestor of the types of information available in order to help the requestor narrow his request. Open Records Decision No. 31 (1974).

received three open records requests, including at least one from attorneys representing the family of the deceased accident victim. We note that the identity and possible motives of a requestor are not pertinent to an inquiry under the Open Records Act. Gov't Code §§ 552.222, .223

This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for damages and promises further legal action if such is not forthcoming. Open Records Decision No. 551 (1990). However, in Open Records Decision No. 361 (1983), we determined that litigation was not reasonably anticipated where an applicant who was rejected for employment hired an attorney, who as part of his investigation, sought information about that rejection. In that situation and the one at hand, records have been sought as part of an investigation but the attorney has not demanded damages and threatened to sue. There may be a chance of litigation in this situation, but you have not provided this office "concrete evidence" that litigation is reasonably anticipated. Open Records Decision No. 452 (1986) at 4. Since the city has not met its burden of showing that litigation is reasonably anticipated, the memorandum may not be withheld from disclosure.

We agree that access to the EMS records at issue is governed by section 773.091 of the Health and Safety Code. See Open Records Decision No. 598 (1991).² Section 773.091(b) of the Health and Safety Code provides in pertinent part:

Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

²Although Open Records Decision No. 598 (1991) addressed a release of records under the Medical Practice Act, it noted section 773.091 of the Health and Safety Code:

Section 773.091 thus provides for the same confidentiality, exceptions to confidentiality, and requirements for release of the information at issue as does section 5.08 of the Medical Practice Act, without conflicting with the provisions of that act. Although release of the information to one qualified to have it is not explicitly mandated by section 773.091 *et seq.*, we believe that reading the statute in harmony with the Medical Practice Act requires such a result as to these records. Our analysis under the Medical Practice Act is therefore equally applicable to a consideration of the issue under the Health and Safety Code provisions.

However, the Emergency Medical Services Act also provides under section 773.092(e):

Communications and records that are confidential under this section may be disclosed to:

....

(4) any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf for the release of confidential information as provided by Section 773.093.

Section 773.093, regarding consent, provides the following:

(a) Consent for the release of confidential information must be in writing and signed by the patient . . . or a *personal representative* if the patient is deceased. [Emphasis added.]

You state that it is the city's position that "until some type of legal proof is provided to establish legal representation" the EMS records may not be released. You also have asked that an individual claiming to be the personal representative of the individual who died supply evidence that she is, in fact, the personal representative.

This office addressed the issue of what type of proof may be required of a personal representative in Open Records Decision No. 632 (1995) (copy enclosed). We note that section 773.091 of the Health and Safety Code does not define the term "personal representative," nor does it require proof that a party authorizing release of records is in fact a personal representative of the deceased. In Open Records Decision No. 632 (1995), this office determined that the term "personal representative" as used in section 773.093 of the Health and Safety Code, signifies "personal representative" as defined in section 3(aa) of the Probate Code. However, the Probate Code does not necessarily require that all personal representatives bear letters testamentary or of administration. Thus, the city must accept other types of evidence establishing an individual's personal representative status, such as, for example, affidavits. Open Records Decision No. 632 (1995) at 4; *see also* Open Records Decision No. 598 (1991) (assuming without information to contrary that deceased's widow is his personal representative for purposes of the Medical Practice Act and Health and Safety Code provisions).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records.

If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Ruth H. Soucy". The signature is fluid and cursive, with the first name "Ruth" being more prominent.

Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/rho

Ref.: ID# 34332

Enclosures: Submitted documents
Open Records Decision No. 632 (1995)

cc: Mr. Bob Gorsky
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(w/o enclosures)